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No. 552

In the
Supreme Court of the United States
OCTOBER TERM, 1965

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL.,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY TO MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION TO PETITION FOR CERTIORARI.

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With expertness, the Interstate Commerce Commission's Memorandum Brief in opposition to the instant Petition for Certiorari wilily displays adeptness at begging the great constitutional question before this Honorable Court.

In endeavoring to assure Your Honors that the Writ needn't issue, the Commission cautiously avoids responding to the posed constitutional issue, and speciously asserts that authority for the challenged act was granted by Congress and that its right to proceed, pursuant therewith, has heretofore been considered and affirmed.

Most assuredly, judicial consideration of the constitutionality of a statute does not become precluded upon its legislative enactment. Even in this era of expediency, the ultimate source of authority for a federal agency's activity is still our Constitution.

The Commission intimates that the constitutional validity of Title 49, U.S.C., Section 322(b), was affirmed by, *United States and Interstate Commerce Commission* v. *Lassiter,* 203 F.Supp. 20 (W.D. La.), affirmed, 371 U.S. 10; and *United States and Interstate Commerce Commission* v. *City of Jackson, Mississippi,* 318 F.2d 1 (C.A. 5). In neither of the above cases is the Commission's authority constitutionally challenged, and said cases are plainly irrelevant to the question presented here. The instant petition presents the first opportunity this Honorable Court has had to determine the constitutionality of the challenged statute.

In directing Your Honors solely to the factual entrance of *United States* v. *Cox,* 342 F.2d 167 (C.A. 5), Certiorari denied, 381 U.S. 935, the Commission seeks to divert your attention from the foundation upon which that constitutional skyscraper was constructed, and also from the legal structure that holds it intact. Clearly, the holding of the *Cox* case is controlling upon, rather than irrelevant to, the constitutional issue presented herein.

As was stated by the Court of Appeals for the Fifth Circuit in the *Cox* case, 342 F.2d 167, at Page 151:

> "The Attorney General is the hand of the President in taking care that the laws of the United States, in legal proceedings and in the prosecution of offenses, be faithfully executed.
>
> "It is as an officer of the Executive Department that he exercises a discretion as to whether or not there shall be prosecution in a particular case."

By reason that the Commission recognizes that the constitutional conflict between the United States Court of Appeals for the Fifth and Seventh Circuits is of such fundamental importance in the conduct of the day to day affairs of our Government, that this Court would surely be compelled to grant Certiorari in order to answer the same, it elects to avoid and misrepresent the basic significance of the conflict posed, upon the constitutional issue now before this Court.

The Circuit Court of Appeals for the Fifth Circuit, in the *Cox* case, does not merely determine that the United States Attorney cannot be compelled by the Courts to sign an indictment. Rather, said cause rests upon the constitutional premise, stated at 342 F. 2d 190, that:

> "The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General."

The Court of Appeals for the Seventh Circuit, (Ap. 3a), in conflict with the *Cox* case, has plainly held that a federal body, non-executive in constitutional character, may enforce the laws of the land, stating:

> ". . . in our judgment, the function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President . . ."

Never could a point be more relevant. Never could such an important issue be in more direct conflict.

The character of an independent administrative agency requires that it be free from the political influence of the Executive Department in the performance of its executive regulatory functions. However, the performance of an executive function by the administrative agency, within the sphere of its own administrative procedure, should not be likened to an exercise of the executive power constitu-

tionally charged to the President. The regulatory function of the Commission in initiating an administrative proceeding, and in the execution of its powers within its own administrative procedures, must be graphically differentiated from the act of initiating and the subsequently conducting a judicial proceeding, on behalf of the "People", to enforce the laws of the United States, inasmuch as a judicial action is solely the exercise of an executive power reserved to the President and his agents, with its attendant political responsibilities to the "People".

To permit Congress to vest the Commission with the executive power that is constitutionally charged to the Attorney General, as an agent of the President, is to enable Congress to accomplish by indirection that which it is prohibited from doing directly.

In order to assure the efficient functioning of a coordinated system of government, it is essential that Your Honors grant the instant Petition for a Writ of Certiorari, and ultimately render a determination that will both enable the Executive Branch of our Government and the independent administrative agency to each freely operate within their respective legal spheres of power and confine the activities of said bodies, each to its respective domain.

Certiorari must be granted to resolve said conflict, if good order among the jurisdictions of this Court, as well as between the three branches of our Government, is to be not only maintained, but restored.

Respectfully submitted,

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